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No. 07-353

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOSÉ SÁNCHEZ, *et al.*,

Petitioners,

v.

TRIPLE-S MANAGEMENT, CORP., *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MC-21 CORPORATION

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QUESTION PRESENTED

Whether the First Circuit's opinion affirming the District Court's decision to defer the class-certification determination to consider the merits of the case, and then ordering summary judgment *sua sponte* after giving notice to Petitioners and given the sufficiently advanced stage of discovery, conflicts with the decisions of this Court or a Court of Appeals, or departs from the accepted and usual course of judicial proceedings.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent MC-21 Corporation is wholly owned by Orbix HealthCare Corporation, which is not publicly held.

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INTRODUCTION

This case is about the District Court's exercise of its inherent power to weed out untenable claims. It does not call for this Court to exercise its supervisory power. The deficiencies in Petitioners' RICO-based claims became evident during briefing on class certification. Those deficiencies stemmed from Petitioners' own admissions. Confronted with them, the District Court found it unwise to go forward with the class-certification determination. Instead, the District Court decided to consider the viability of Petitioners' claims and ordered Petitioners to show cause why summary judgment should not enter against them.

Petitioners responded by challenging the District Court's procedural approach as unprecedented. They argued that *sua sponte* summary judgment could not be entered until discovery was complete. Petitioners nevertheless did not seek an extension of time to respond to the order to show cause, nor did they invoke the mechanism of Federal Rule of Civil Procedure 56(f). Instead, they presented hundreds of pages of evidentiary materials, including their own affidavits and the affidavits of two purported experts. The District Court found those materials insufficient to create a trial-worthy issue and properly entered summary judgment for Respondents. On appeal, the First Circuit affirmed that decision.

Petitioners now seek certiorari on whether the First Circuit correctly affirmed the District Court's decision deferring the class-certification determination to consider the merits of the case, and then ordering

summary judgment *sua sponte*. Petitioners maintain that the District Court "converted" Respondents' oppositions to class certification into a *sua sponte* motion for summary judgment by conducting an impermissible inquiry into the merits of the case, and that it improperly entered summary judgment *sua sponte* without a "full" evidentiary record.

Nothing forbids a district court from deferring a ruling on class certification to assess the viability of a claim. The District Court properly determined that the circumstances warranted to first assess whether Petitioners' claims were viable. The District Court acted within its discretion in ordering Petitioners to show cause why summary judgment should not be entered. It gave Petitioners clear guidance on what they needed to show to avoid dismissal and afforded them ten working days to come forward with their evidence. By then, discovery was sufficiently advanced for the District Court to accurately determine whether a genuine issue of material fact existed, and for Petitioners to know what evidence could likely be adduced.

Upon Petitioners' failure to demonstrate the existence of any issue worthy of trial, the District Court entered summary judgment against them. The First Circuit's opinion affirming that decision comports with the decisions of this Court and other Courts of Appeals, and is consistent with the accepted and usual course of judicial proceedings. The Court, therefore, should deny the Petition.

STATEMENT OF THE CASE

Petitioners brought this lawsuit against Triple-S Management Corporation and its subsidiaries (collectively, "Triple-S") and MC-21 Corporation ("MC-21"), on behalf of several putative classes of providers of health care services under the policies issued by Triple-S, and on behalf of persons insured under those policies. (Pet. 5a.) The complaint charged Respondents with a scheme to defraud Petitioners through a pattern of mail and wire fraud and extortion, in violation of the Racketeer-Influenced and Corrupt Organizations Act ("RICO"). (Pet. 5a-6a.) Among those allegedly wronged by the scheme were members of a putative pharmacist sub-class purportedly represented by named plaintiff José Varela ("Varela"). (Pet. 71a.) MC-21 administered prescription drug benefits under the policies issued by Triple-S. (Pet. 5a, n.1.)

The District Court dismissed eight of the twelve counts in the original complaint upon motion by the Respondents. Petitioners then filed an amended complaint re-pleading the four counts that survived dismissal, identifying them with the same numbers used in the original complaint. (Pet. 6a.) Counts IV, VI and VIII of the amended complaint charged predicate acts of mail and wire fraud.[1] Count VII was predicated on extortion in violation of the Hobbs Act. (Pet. 6a-7a, 33a.) Petitioners did not appeal the dismissal of the other eight counts. (Pet. 6a, n.2.)

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1. Count VIII was additionally predicated on violation of the Medicare Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) (Supp. 2006). However, Petitioners subsequently waived that theory. (Pet. 7a, n.3.)

Subsequent to the amended complaint, the parties filed a joint proposed scheduling order that was approved by the District Court. That order provided for two phases of discovery, bridged by briefing on class certification. The first discovery phase would cover class certification issues; the second one, the purported merits of Petitioners' claims. (Pet. 7a.) The order, however, expressly acknowledged that "class certification discovery [would] in part overlap with merits discovery." Although the deadline for filing dispositive motions was set for after the completion of merits discovery, the scheduling order expressly allowed the parties to file dispositive motions before such deadline "if they underst[ood] that the issue(s) [were] ripe." (Pet. 16a.)

Following several months of extensive document and deposition discovery that touched upon issues bearing directly on the purported merits of the case, Petitioners moved for class certification. (Pet. 8a, 35a.) In their respective oppositions, Respondents argued that Petitioners had not sustained any RICO injury, and therefore lacked standing to bring this suit. (Pet. 8a, 56a-57a.) Respondents based those arguments mainly on Petitioners' own deposition testimony, including Varela's. The District Court found those arguments "and the corresponding facts . . . so compelling," that instead of deciding the class-certification issue, it ordered Petitioners to show cause why summary judgment should not be entered against them. (Pet. 57a & 77a.) To proceed with class certification under those circumstances, the District Court reasoned, would have been "a poor use of resources." (Pet. 57a.)

In its show-cause order, the District Court explained why it found Petitioners' claims unsupportable. It

indicated what Petitioners needed to show to withstand summary judgment and afforded Petitioners ten working days to do so. (Pet. 75a-78a.) Petitioners responded by challenging the District Court's procedural approach, arguing that *sua sponte* summary judgment could not be entered until they had had an opportunity to complete the discovery permitted by the scheduling order. They did not seek an extension of time to respond to the order to show cause. (Pet. 9a.) They also did not invoke the mechanism of Fed. R. Civ. P. 56(f). Instead, Petitioners submitted hundreds of pages of evidentiary materials, including their own affidavits and the affidavits of two purported experts. (Pet. 9a.)

Those materials, the District Court found, "unequivocally [showed] that [Respondents] did not engage in either mail and wire fraud or extortion in their dealings with [Petitioners]." (Pet. 36a.) The District Court also determined that additional discovery would not assist Petitioners in any way, and therefore denied Petitioners any further discovery. (Pet. 11a, 36a, 42a-43a.) Thus, having concluded that Petitioners had failed to establish an actionable RICO claim, the District Court entered summary judgment for Respondents. (Pet. 9a-12a, 41a-54a.)

On appeal, Petitioners challenged the District Court's decision on procedural and substantive grounds. Procedurally, Petitioners maintained that the District Court erred in entering summary judgment before affording them an opportunity to complete the merits discovery allowed by the scheduling order. Substantively, they argued that the evidence presented in response to the show-cause order sufficed to create a trial-worthy

issue. (Pet. 12a.) The Circuit Court rejected those arguments and affirmed the District Court's entry of summary judgment. (Pet. 25a.)

As to Petitioners' procedural challenge, the Circuit Court first stated that it had never ruled that a district court cannot enter summary judgment *sua sponte* before discovery has been completed. (Pet. 13a.) Rather, a district court need only "wait until the parties have enjoyed a reasonable opportunity —not necessarily the full duration of the discovery period— to glean the material facts." (Pet. 13 a.) (Internal quotation marks and footnote omitted.) Under the circumstances, the Circuit Court determined that Petitioners had enjoyed such reasonable opportunity. This conclusion drew largely from the fact that discovery was sufficiently advanced when the District Court ordered summary judgment, and that the District Court had based its decision mostly on Petitioners' own deposition testimony. (Pet. 14a-15a.) The Circuit Court also determined that the District Court had afforded Petitioners adequate notice and an opportunity to present their evidence on the essential elements of their claims. Finally, the Circuit Court found that, because the District Court's scheduling order expressly allowed the parties to file dispositive motions prior to the deadline for doing so, Petitioners "could not reasonably have believed . . . that they would under no circumstances have to oppose summary judgment prior to the completion of merits discovery." (Pet. 16a.)

Before this Court, Petitioners seek review only of the procedural aspects of this case under the standard of Supreme Court Rule 10(a).

REASONS FOR DENYING THE PETITION

Petitioners argue that the Circuit Court erred in affirming the "conversion" of Respondents' oppositions to class certification into a *sua sponte* motion for summary judgment, and the entry of summary judgment without a "full" evidentiary record. Contrary to what Petitioners maintain, the Circuit Court's opinion does not conflict with the decisions of this Court or a Court of Appeals, nor departs from the accepted and usual course of judicial proceedings. The Court, therefore, should deny the Petition.

A. The District Court Properly Deferred the Class-Certification Determination to Consider the Merits of the Case.

Petitioners argue that the District Court improperly "converted" Respondents' opposition to class certification into a *sua sponte* motion for summary judgment by inquiring into the merits of Petitioners' claims while determining whether the case could be maintained as a class action. (Pet. 13-14.) According to Petitioners, this approach is proscribed by this Court's opinion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) and Fed. R. Civ. P. 23. Petitioners' argument is an incorrect characterization of the District Court's actions, as well as a misstatement of the law.

The District Court was well aware of its duty and so expressed it. In fact, it agreed with Petitioners that "an objection to class certification is not the proper vehicle through which to attack . . . standing," nor "the proper mechanism through which 'to conduct a

preliminary inquiry into the merits of a suit.'" (Pet. 59a & 61a, *quoting Eisen*, 417 U.S. at 177-78.) However, because Respondents' arguments and the corresponding facts so compellingly showed that Petitioners' claims were not viable, the District Court determined that it would not decide Petitioners' motion for class certification, and instead would consider, as a separate matter, whether Petitioners had any cognizable claim under RICO. (Pet. 56a.) Before doing that, the District Court in its show-cause order explained in detail the deficiencies in Petitioners' claims, indicated what Petitioners needed to show to withstand summary judgment and gave them ten working days to come forward with their evidence. (Pet. 75a-78a.) Nothing in *Eisen* or in Rule 23 forbids this approach, and it is not unprecedented.

Eisen and Rule 23 do not mandate that the class-certification determination take precedent over a ruling on the merits. Rule 23(c) does establish that the court must determine whether a case may be maintained as a class action "at an early practicable time." Yet this requirement does not mean that a district court must under all circumstances postpone a ruling on the merits, if warranted, until after the class-certification issue is decided. *See Greenlee County v. United States*, 487 F.3d 871, 880-81 (D.C. Cir. 2007); *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 92-93 (D.C. Cir. 2001); *Floyd v. Bowen*, 833 F.2d 529, 534-35 (5th Cir. 1987); *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984) (all holding that neither *Eisen* nor Rule 23 require a district court to determine whether a case may be maintained as a class action before ruling on the merits).

An absolute rule forbidding a district court from considering the merits of a case before determining whether it may be maintained as a class action would result, as the District Court in this case recognized, in a waste of the court's and the parties' resources in cases, like this one, which are not viable. *See* MANUAL FOR COMPLEX LITIGATION, Fourth, § 21.133 (2004) (suggesting that "courts should rule early on motions to dismiss, challenging whether the plaintiffs have stated a cause of action," since "[e]arly resolution of these questions may avoid expense for the parties and burdens for the court and may minimize the use of the class action process for cases that are weak"). The Advisory Committee's note on the 2003 amendments to subdivision (c)(1) of Rule 23 further recognizes, as one of the circumstances justifying the postponement of the class-certification determination, the possibility that "[t]he party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified."

B. *Sua Sponte* Summary Judgment Was Appropriate.

"[D]istrict courts are widely acknowledged to possess the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Only two conditions limit that power: (1) that the targeted party is given notice and an opportunity to present its evidence on the essential elements of its claim or defense, and (2) that discovery is sufficiently advanced for the court to accurately determine whether a genuine issue of

material fact does or does not exist, and for the litigants know what material evidence likely can be proffered. *See Frederique-Alexandre v. Dept. of Nat. and Envtl. Resources of Puerto Rico*, 478 F.3d 433, 438-39 (1st Cir. 2007); *Leyva v. On The Beach, Inc.*, 171 F.3d 717, 720 (1st Cir. 1999); *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 29 (1st Cir. 1996). Those conditions were met in this case.

1. Petitioners Were Given Notice and an Opportunity to Present Evidence in their Favor.

In its show-cause order, the District Court explained the deficiencies in Petitioners' claims, warned Petitioners of its intention to dispose of those claims summarily, and gave Petitioners ten working days to show why summary judgment was not warranted. The notice requirement, therefore, was fully met in this case. *See Leyva*, 171 F.3d at 720 ("In the context of a *sua sponte* summary judgment, 'notice' means that the targeted party 'had reason to believe the court might reach the issue and received a fair opportunity to put its best foot forward.'"); *Stella v. Tewksbury Mass.*, 4 F.3d 53, 56 (1st Cir. 1993) (the district court must afford the targeted party "the benefit of the minimum 10-day period mandated by Rule 56").

2. Discovery Was Sufficiently Advanced.

"Sufficiently advanced" discovery means simply that the evidentiary record is such that the court is in a position to "make an accurate determination on whether a genuine issue of material fact does or does not exist, and, relatedly, . . . [that] the litigants know what material

evidence likely can be adduced." *Stella*, 4 F.3d at 55 (citations and internal quotation marks omitted). Discovery in this case was sufficiently advanced for the District Court to enter summary judgment *sua sponte*, as the record shows.

During the course of several months, the parties exchanged voluminous written discovery, and the depositions of the named Petitioners and of corporate representatives of Respondents were taken. (Pet. 8a, 15a.) That discovery "touched upon issues that [bore] directly on the case's merits[,] . . . [and] revealed with unusual clarity that [Petitioners'] claims [were] insufficient to support a cause of action." (Pet. 35a.) In response to the District Court's order to show cause, Petitioners also submitted their own affidavits and the affidavits of two purported experts. (Pet. 9a.) However, "[n]either [Petitioners'] experts' declarations —nor, by . . . [Petitioners'] own admission, their own declarations or deposition testimony— so much as hint[ed] at . . . a [fraudulent] scheme." (Pet. 21a.) "In the final analysis," the District Court noted, the alleged scheme was "something that [Petitioners] merely reasonably suspect[ed] but [could not] prove until merits discovery." (Pet. 45a.) (Internal quotation marks omitted.) "This description," the District Court ruled, was "paradigmatically antithetical" to the particularity that Fed. R. Civ. P. 9(b) requires in pleading fraud. (Pet. 45a.)

The evidence further demonstrated that Petitioners were unable to support their allegations under the Hobbs Act. (Pet. 48a-53a.) Petitioners failed to "point . . . to anything in their deposition testimony or declarations

suggesting that they" suffered direct injury as a result of the alleged Hobbs Act violations. (Pet. 24a.)

Against this background, the District Court found "no facts that [Petitioners] could conceivably uncover — or, at least, none consistent with the record . . .— so impressive as to remedy the case's deficiencies." (Pet. 36a.) It also determined that Petitioners had "no legal basis through which they [could] lay claim to continued discovery." (Pet. 43a.)

The record, therefore, amply supports the District Court's determination that discovery was sufficiently advanced to allow it to order summary judgment *sua sponte*, and that additional discovery would have been futile. The Circuit Court correctly affirmed that decision.

C. The Law Does Not Require Under All Circumstances "Full" or "Complete" Discovery Before *Sua Sponte* Summary Judgment May Be Ordered.

Petitioners argue that *sua sponte* summary judgment may be ordered only after "full" or "complete" discovery. *E.g.*, (Pet. 12 & 16) ("full evidentiary record"), (Pet. 13 & 19) ("complete evidentiary record"), (Pet. 15) ("full discovery"). There is no support for this proposition. *Sua sponte* summary judgment is not held to a standard higher than summary judgment upon motion. Federal Rule of Civil Procedure 56 governs both under the same standard. *See Berkovitz*, 89 F.3d at 29-30; *Stella*, 4 F.3d at 56. That rule does not require that

discovery be completed before a party may move for summary judgment.

Of those Courts of Appeals that have addressed the requirements for a district court to order summary judgment on its own initiative, none has established an absolute rule —as Petitioners argue— that in all cases a "full" or "complete" evidentiary record must exist before *sua sponte* summary judgment may be entered. *See, e.g.*, *Frederique-Alexandre*, 478 F.3d at 438 (notice and "sufficiently advanced" discovery); *Couden v. Duffy*, 446 F.3d 483, 500 (3rd Cir. 2006) (notice and "an opportunity to present relevant evidence in opposition"); *aaiPharma Inc. v. Thompson*, 296 F.3d 227, 235 (4th Cir. 2002) (notice and "a reasonable opportunity to be heard"); *Leffman v. Sprint Corp.*, 481 F.3d 428, 430 (6th Cir. 2007) (notice and "a reasonable opportunity to respond to all the issues to be considered by the court"); *Acequia, Inc. v. Prudential Ins. Co. of America*, 226 F.3rd 798, 807 (7th Cir. 2000) (notice and "a fair opportunity to present evidence in opposition"); *Figg v. Russell*, 433 F.3d 593, 597 (8th Cir. 2006) (notice and "an adequate opportunity to demonstrate why summary judgment should not be granted") (citation omitted); *U.S. v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989) (notice and "an opportunity to present new evidence as required by Federal Rule of Procedure 56(c)"); *Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1312-13 (11th Cir. 2007) (notice and an "extensively developed" evidentiary record).

Even those Courts of Appeals that have expressed concern about the completeness of the evidentiary record in the context of *sua sponte* summary judgment have not established the absolute rule that Petitioners

propose. *See, e.g., Artistic Entertainment, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1202 (11th Cir. 2003) (where *sua sponte* summary judgment is ordered *without notice*, a "complete" evidentiary record is required); *Ramsey v. Coughlin*, 94 F.3d 71, 74 (2nd Cir. 1996) (*sua sponte* summary judgment may be granted when discovery is complete, *or* when it is "clear that further discovery would be of no benefit").

Petitioners cite *Celotex* for the proposition that full discovery must take place before summary judgment may be ordered. (Pet. 15). Yet *Celotex* does not support that proposition. The only reference to "full discovery" in the Court's opinion in *Celotex* should be understood in the context where it is used, as well as in the context of Rule 56 as a whole, bearing in mind that rule's purpose. In *Celotex* the Court noted:

> The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

477 U.S. at 326 (footnote omitted). The Court's reference to "full discovery" in that context should be taken merely as a reminder that a nonmovant unable to present essential facts to oppose summary judgment may resort

to taking additional discovery through the mechanism of Rule 56(f), which Petitioners did not invoke in this case.

The Court's reference cannot be taken to mean that complete discovery is necessary for the entry of summary judgment, either sought or *sua sponte* inasmuch as Rule 56 governs both, since Rule 56 expressly allows a party to move for summary judgment "at any time," in the case of a defending party or, in the case of a claimant, "at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party." Fed. R. Civ. P. 56(a) & (b). To hold otherwise would defeat one of the main purposes of Rule 56: "to isolate and dispose of factually unsupported claims or defenses." *Celotex*, 477 U.S. at 323-24 (footnote omitted).

D. Petitioners Failed to Invoke Fed. R. Civ. P. 56(f).

Petitioners complain that they were entitled to rely on the scheduling order and that they were "blindsided" by the District Court's decision to consider the merits of the case when it did. (Pet. 17.) Harboring that alleged expectation was unfounded and unrealistic. The scheduling order expressly allowed the parties to file dispositive motions before the deadline for doing so if they believed that the issues were ripe. (Pet. 16a.) If Petitioners truly believed that further discovery would have helped them to forestall summary judgment, they could have availed themselves of the mechanism of Fed. R. Civ. P. 56(f), but they did not. Petitioners cannot claim

now that they needed additional discovery. *See Kiman v. New Hampshire Dept. of Corrections*, 451 F.3d 274, 282 n.7 (1st Cir. 2006) (holding that a party affected by summary judgment who "proceeded to oppose summary judgment without filing a Rule 56(f) motion with the district court, . . . cannot not argue [on appeal] that the district court's ruling was incorrect due to insufficient discovery") (citation omitted); *cf. Resolution Trust Corp. v. North Bridge Assoc., Inc.*, 22 F.3d 1198, 1204 (1st Cir. 1994) (holding that "[i]n the absence of an applicable time limit . . . a party must invoke Rule 56(f) within a reasonable time following receipt of a motion for summary judgment").

Federal Rule of Civil Procedure 56(f) affords a party confronted with summary judgment the opportunity to "demonstrate an authentic need for, and an entitlement to, an additional interval in which to marshal facts essential to mount an opposition." *Resolution Trust Corp.*, 22 F.3d at 1203. To benefit from the rule, the movant must, among other things, "set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Id.* Petitioners did not meet that burden.

Petitioners' generic plea for additional discovery was insufficient to warrant Rule 56(f) relief. *See Mass. School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 44 (1st Cir. 1998) (finding that plaintiff did not comply with Rule 56(f) when it failed to specify how the discoverable materials would have raised a triable issue); *C.B. Trucking, Inc. v. Waste Management, Inc.*, 137 F.3d

41, 45 (1st Cir. 1998) (finding that plaintiff's "non-specific request that the court deny the motion [for summary judgment] so that it could conduct additional discovery" did not satisfy Rule 56(f)).

CONCLUSION

Petitioners have not established any reason that calls for an exercise of this Court's supervisory power, and none exists. Respondent MC-21 therefore respectfully requests that the Petition be denied.

Respectfully submitted,

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